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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ESTEBAN CABRERA,

Defendant and Appellant.

B210696

(Los Angeles County  
Super. Ct. No. BA333368)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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Esteban Cabrera appeals from his conviction by jury verdict of three counts of attempted murder. He challenges the jury instruction on evidence of gang activity; the trial court's exclusion of defense evidence; and the sufficiency of the evidence to support the jury's verdict that the crimes were committed in furtherance of a criminal street gang. (Pen. Code, § 186.22.)<sup>1</sup> He also claims prosecutorial misconduct and ineffective assistance of counsel. We find no basis for reversal and affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

At 6:00 p.m. on December 7, 2007, Carlin Murray and his cousins Lawrence Genyard, Juan Hernandez and Jamar<sup>2</sup> were on Compton Avenue near 49th Street on the way to a store. Each of the four men was 19 or 20 years old and is an African-American. A man, accompanied by a woman, approached on foot. The man spoke to the group, saying, "It's BMS Hood." The man was Hispanic. Murray said, "I don't gang bang." His cousins said nothing and Jamar left right away. The man went around the corner and shouted, "Hey, come here." Another man, identified by Murray as appellant, came around the corner walking with the female Murray had seen earlier. Murray saw him pull a chrome gun from his pants. Murray turned around and ran.

Appellant said nothing before he started shooting at Murray and his companions. Murray heard about seven shots which sounded like they were fired in his direction. Murray ran through traffic, eventually passing a patrol car. While stopping at a Laundromat, he met up with his cousins. When Murray saw appellant being put on the ground by police officers, he and his cousins went home.

Los Angeles Police Officer Joshua Lukaszewski and his partner were patrolling the area of Compton Avenue and 49th Street in a marked police vehicle. He heard a gunshot, followed by six more. The next thing he saw was three African-American males

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Jamar's last name is not in the record.

running northbound on Compton into the street. Two ran on one side of the patrol car and the third ran on the other side. One yelled something about being shot at. As his partner slowed the patrol car, Officer Lukaszewski saw a man running toward him on the sidewalk, firing two shots in the officer's direction. At trial, he identified appellant as that man.

Officer Lukaszewski got out of the patrol car and lost sight of appellant behind a truck. He heard a gun drop to the ground. He saw appellant running toward him. Officer Lukaszewski drew his gun and ordered appellant to the ground. Appellant complied and was taken into custody by the officers. Officer Lukaszewski returned to the area where he heard the gun fall and recovered a 9-millimeter handgun. Forensic testing revealed gunshot residue on appellant's left hand.

Appellant was charged with three counts of willful, deliberate, premeditated attempted murder. (§§ 665/187, subd. (a).) It was alleged that all three crimes were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (c). It also was alleged that appellant personally used and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b) and (c). The jury found appellant guilty on all counts and found the gang and firearm allegations true.

Appellant was sentenced to three consecutive terms of 15 years to life plus an additional 20 year term on each count for intentional discharge of a firearm under section 12022.53, subdivision (c), for an aggregate sentence of 105 years to life. This timely appeal followed.

## **DISCUSSION**

### **I**

Appellant challenges CALCRIM No. 1403, which limits the purposes for which evidence of gang activity may be used by the jury. As given, the instruction read: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to

prove the gang crime allegation charged; [¶] OR [¶] The defendant had a motive to commit the crime charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

Appellant argues the portion of the instruction allowing the jury to consider gang evidence in its evaluation of credibility is ambiguous and an incorrect statement of law. He contends the instruction diminishes the prosecution’s burden of proof and denied him a fair trial because “a reasonable juror could have reasoned if appellant was a gang member he was guilty because all gang members are bad people and predisposed to commit crime and are therefore not to be believed when they testify.”

Anticipating that respondent would argue the claim is forfeited because no objection was raised in the trial court, appellant argues the error affected his fundamental rights. We agree the issue is preserved for appeal. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315, fn. 43 [because defendant’s contentions raised issues concerning his substantial rights, the court addressed them despite failure to object]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 560 [inadequate instruction is deemed excepted to, and failure to request a proper instruction does not bar defendant from asserting point on appeal where substantial rights of defendant are affected].)

Appellant contrasts CALCRIM No. 1403 with CALJIC No. 17.24.3.<sup>3</sup> He argues that while CALJIC No. 17.24.3 does not instruct the jury that it may consider gang

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<sup>3</sup> That instruction reads: “[Evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crime[s] for which defendant[s] [is] [are] on trial.] [¶] [Except as you will be otherwise instructed, this] [This] evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. It may be considered by you [only] for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the

evidence to evaluate the credibility of a witness. CALCRIM No. 1403 does. According to appellant, the CALCRIM instruction does not limit the purposes for which gang evidence may be used by a jury, but instead lists the purposes for which such evidence may not be used. He argues that *People v. Hernandez* (2004) 33 Cal.4th 1040, which is cited in the Bench Note for CALCRIM No. 1403, does not support use of gang evidence to assess the credibility of a witness or defendant because that use was not among the permissible uses discussed by that court. He analogizes to cases allowing the admission of evidence of drug addiction as relevant to the ability of a witness to perceive events, but not to establish bad character. Appellant also argues that gang evidence was not relevant to his credibility.

In *People v. Hernandez, supra*, the Supreme Court held that evidence of the defendant's gang affiliation "can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (33 Cal.4th at pp. 1049, 1053.) We conclude that this list was not exclusive.

CALCRIM No. 1403 recently was addressed in *People v. Samaniego* 2009) 172 Cal.App.4th 1148 (*Samaniego*). The court acknowledged the risk that gang evidence may lead the jury to infer that the defendant has a criminal disposition and is therefore guilty of the charged offense. (*Id.* at p. 1167.) But it observed that "evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192; see also *People v. Hernandez*[, *supra*,] 33 Cal.4th 1040, 1049; Evid.Code, §§ 210, 351.)" (*Ibid.*)

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benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] [You are not permitted to consider such evidence for any other purpose.]” (CALJI (Fall 2009 ed.).)

The *Samaniego* court held that gang evidence may be relevant on the issue of a witness's credibility. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168.) It explained: "CALCRIM No. 1403, as given here, is neither contrary to law nor misleading. It states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the *credibility of witnesses*." (*Ibid.*, italics added.) The Court of Appeal rejected the defendant's argument, similar to that raised here, that the instruction is not proper with regard to motive and credibility. (*Ibid.*)

The evidence in *Samaniego* supported an instruction that gang evidence could be considered by the jury on the issue of witness credibility. The Court of Appeal noted that several witnesses testified differently at trial than at the preliminary hearing or in prior statements made to the police. One witness recanted his statement to detectives while others testified more favorably for the prosecution at trial than in prior statements. The court concluded that "[t]he disparities in the witnesses' testimony justified use of gang evidence to provide a plausible explanation for them." (172 Cal.App.4th at p. 1169.) The defense had attempted to impeach the prosecution witnesses with the contradictions between their testimony and prior out-of-court statements. The *Samaniego* court concluded that gang evidence was relevant to provide an explanation for the less favorable, prior statements. (*Ibid.*)

Appellant argues the jury should not have been instructed that gang evidence could be used to weigh his credibility in testifying in his own defense. He concedes CALCRIM No. 1403 was correct as it related to motive.

Gang evidence has been held admissible as to the credibility of witnesses. In *People v. Ayala* (2000) 23 Cal.4th 225, "witnesses against defendant feared the Mexican Mafia, and that fear at times explained their prior conduct, their motivation to testify, or their accepting government protection—items that bore on the witnesses' credibility, and thus items that they needed to explain." (*Id.* at p. 276.) The Supreme Court held such evidence affected the credibility of the witnesses. (*Ibid.*)

In *People v. Sisneros* (2009) 174 Cal.App.4th 142, a witness who drove the shooter to the murder scene, witnessed the shooting, and drove the shooter from the scene refused to testify at trial by declining to take the oath. A gang expert witness testified that the witness, although in custody, was a target for gang retribution if she were to cooperate by testifying. (*Id.* at p. 152.) The Court of Appeal held that evidence of the gang's "penchant" for witness intimidation was relevant as to the credibility of the eyewitness testimony.

In *People v. Sanchez* (1997) 58 Cal.App.4th 1435, the court rejected a claim that the failure of defense counsel to object to gang evidence amounted to ineffective assistance of counsel. In that case, there was no evidence that the murder was gang related. (*Id.* at p. 1450.) The Court of Appeal concluded that the gang evidence was admissible on the issue of the witnesses' credibility, particularly their reluctance to testify because of fear of retaliation. (*Id.* at p. 1450; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369 [evidence of witness's fear of gang retaliation admissible as to credibility].)

Appellant distinguishes *Samaniego, supra*, 172 Cal.App.4th 1148, on the ground that it involved witnesses other than the defendant. The same is true of *People v. Ayala, supra*, 23 Cal.4th 225, *People v. Sisneros, supra*, 174 Cal.App.4th 142, and *People v. Sanchez, supra*, 58 Cal.App.4th 1435. The distinction is not dispositive. In *People v. Doolin* (2009) 45 Cal.4th 390, the Supreme Court held: "[B]y taking the stand, defendant put his own credibility in issue and was subject to impeachment in the same manner as any other witness." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139; see Evid.Code, § 1101, subd. (c).)" (*Doolin, supra*, at p. 438.)

CALCRIM No. 1403 does not instruct the jury that it may consider the gang evidence to conclude that appellant was a bad person and therefore his testimony should not be credited. The instruction expressly informs the jury that such use is improper. Appellant does not argue the jury disregarded the instruction and used the gang evidence to conclude he was of bad character.

Appellant testified that at the time of the incident, four African-American men approached him and started shooting. He said he ducked, then ran, and fired one shot at the four men. He saw officers at the corner and told them shots were fired at him. Appellant admitted his membership in the Barrio Mojados street gang. He said he fired because he was shot at first. He was attempting to protect himself and his pregnant girlfriend and to warn the assailants that he was armed. His friend Happy, also a member of Barrio Mojados, was with him when the arrest was made.

The gang evidence was relevant to assessment of appellant's credibility. The gang expert, Officer Steven Torres, testified that under the circumstances of this crime, appellant could have thought that the four male African-Americans were rival gang members. He said in the general area of the shooting, there are problems between appellant's gang and African-Americans. African-Americans and Hispanics in the area do not get along. The three victims were not gang members, according to Officer Torres's investigation. This evidence was relevant to the credibility of appellant's claim that he fired in self-defense. CALCRIM No. 1403 properly advised the jury that gang evidence could be considered for that purpose, but expressly warned that gang evidence was not to be used to conclude appellant had a bad character or a propensity to commit crime. We find no instructional error.

## II

Appellant raises a number of issues arising from trial court rulings prohibiting Officer Lukaszewski from testifying that appellant said he was being shot at when the officer first encountered him. He argues it was error to exclude the evidence; that the prosecutor committed misconduct in argument in referring to appellant's claim of self-defense; and that his attorney rendered ineffective assistance in failing to object to the prosecutor's argument.

### ***A. Evidentiary Rulings***

The issue of appellant's statement to Officer Lukaszewski was raised during cross-examination of the officer during the prosecution's case. The prosecutor objected that the

defense was attempting to establish that the police failed to investigate appellant's claim that he was a victim, without the necessity of appellant testifying.

Appellant's statement to Officer Lukaszewski was not in the police report, although the officer testified that appellant said something to him at the scene. Because counsel for appellant did not know what the officer would say about appellant's statement, the trial court ruled that the officer would be on call to allow defense counsel to interview him about the statement. If it was consistent with the offer of proof, the defense would be allowed to call the officer to the stand to establish that point. If Officer Lukaszewski said that appellant told him he was being shot at, and that he had not investigated that claim, the trial court indicated it would be fair for the defense to argue later that the officer failed to act. Since the statement by appellant was hearsay, the trial court said the argument that the police did not investigate could be supported by appellant's testimony in his own defense. Defense counsel acknowledged that he understood the point.

Officer Lukaszewski was called as a defense witness. The prosecutor asked for a sidebar. Appellant's attorney said he had spoken to the officer, who confirmed appellant's statement. The prosecutor asked: "What is the theory of admissibility for calling him as another witness after your client testified?" The trial court ruled that the content of the statement could not be elicited from Officer Lukaszewski as a prior consistent statement. Defense counsel protested that he had been prevented from inquiring about the statement on cross-examination.

At that point, defense counsel said: "Everything stands. I'll just ask him other questions." The trial court questioned whether counsel understood its ruling. Defense counsel responded that the trial court said he could not ask "that question" and that he would ask whether the officer investigated based on what appellant said to him. The trial court admonished that the only question counsel could not ask was what appellant said. Defense counsel responded: "Let me ask him that." The trial court reiterated that this was the only thing that was not permissible, and defense counsel said, "Okay."

Appellant argues that his statement to the officer that the alleged victims were shooting at him is admissible under Evidence Code section 1240, the spontaneous statement exception to the hearsay rule. It provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.” The spontaneous statement exception was not raised in the trial court and is not cognizable on appeal. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1314.)

For the first time in his reply brief, appellant argues the statement was not hearsay because it was offered not for the truth of the statement, but to show the officer received the information and failed to conduct any investigation as to whether appellant was the victim. “Generally, a contention may not be raised for the first time in the reply brief.” (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.)

It is apparent from the argument made by trial counsel that he sought to elicit the statement from the officer to corroborate appellant’s self-defense testimony. In any event, appellant fails to demonstrate the relevance of the officer’s failure to investigate appellant’s claim. We find no abuse of discretion in the trial court’s ruling prohibiting Officer Lukaszewski from testifying to the content of the statement made by appellant. As we discuss below, appellant testified to the statement and his counsel vigorously argued self-defense and the officer’s failure to investigate that claim. (*People v. Tuggles* (2009) 178 Cal.App.4th 1106, 1128 [trial court’s exercise of discretion in excluding evidence reviewable for abuse and will not be disturbed “except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice”].)

### ***B. Misconduct***

Appellant argues the prosecutor committed misconduct. Twice she objected to prevent Officer Lukaszewski from testifying to the content of appellant’s statement. In argument, the prosecutor cited the victims’ testimony that they were running for their

lives, yelling that the assailants were shooting at them. She asked the jury to consider whether the victims would have run directly to a police officer if, as appellant testified, they had fired first. The prosecutor argued that Officer Lukaszewski's testimony corroborated the account given by the victims. The prosecutor also questioned the credibility of appellant's testimony that he was merely protecting himself or his pregnant girlfriend from shots fired at them.

Appellant cites the following argument by the prosecutor as misconduct: "If a person is being shot at and thinks their life is in danger or their girlfriend's life is in danger or their fellow BSM gang member's life is in danger, why wouldn't that person say to the police officer right off the bat, 'They're shooting at me, they're shooting at me, hey, I have my gun right here. I shot them. Did you see them shoot officers? Catch those guys. There they go.' That's not what happened."

It is prosecutorial misconduct, appellant argues, to take advantage of a judge's adverse evidentiary ruling against opposing counsel. He contends the prosecutor deliberately attempted to mislead the jury concerning the crucial excluded evidence of appellant's statement to Officer Lukaszewski which corroborated appellant's self-defense testimony.

Appellant cites *People v. Daggett* (1990) 225 Cal.App.3d 751. In that case, the trial court erred when it failed to hold a hearing to determine whether prior acts of molestation by persons other than defendant were sufficiently similar to the molestation charged in the present case to render them admissible. The theory was that the victim's description of sexual acts was more accurate than would be expected from a child. Prior similar acts of molestation were found relevant to allow the defense to argue the specific descriptions were based on acts committed by persons other than the defendant, and thus relevant to the victim's credibility. (*Id.* at p. 757.)

This evidentiary error in *Daggett* was compounded when the prosecutor argued that if the jury believed the victim himself had molested other children, he must have learned that behavior from Daggett's molestation of him. The Court of Appeal held that this was the type of argument the excluded evidence was intended to refute. (*Daggett*,

*supra*, 225 Cal.App.3d at p. 757.) It reasoned: “The prosecution may argue all reasonable inferences from the record, and has a broad range within which to argue the facts and the law. [Citation.] The prosecutor, however, may not mislead the jury. The prosecutor asked the jurors to draw an inference that they might not have drawn if they had heard the evidence the judge had excluded. He, therefore, unfairly took advantage of the judge’s ruling.” (*Id.* at pp. 757-758.) The court held the error was prejudicial because the evidence consisted of the victim’s word against the defendant’s. The court concluded that because the excluded evidence was relevant to the victim’s credibility, it was reasonably probable that a more favorable result would have been obtained absent the evidentiary error. (*Id.* at p. 758.)

*Daggett* is distinguishable because here, there was evidence that contradicted the prosecutor’s claim. It is misconduct for a prosecutor to misstate evidence in argument. (*People v. Davis* (2005) 36 Cal.4th 510, 550.) Contrary to the prosecutor’s argument, there *was* evidence that appellant told Officer Lukaszewski that he was being shot at by the victims: appellant testified to that effect. The fact that the officer was not allowed to testify to the statement did not controvert appellant’s testimony, which was unrefuted by other evidence. The prosecutor’s argument that this statement was not made by appellant was a misstatement of the evidence.

Review on appeal is barred unless an admonition would not have cured the harm. (*People v. Davis, supra*, 36 Cal.4th at p. 550.) Here, an admonition to disregard the prosecutor’s argument as a misstatement of evidence would have cured the harm, but no objection was raised by the defense.

Even if the prosecutorial misconduct issue was preserved for appeal, we find no basis for reversal. “A prosecutor’s conduct violates a defendant’s constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects “the trial with unfairness as to make the resulting conviction a denial of due process.” [Citation.]’ (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) The focus of the inquiry is on the effect of the prosecutor’s action on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Conduct that does not render a

trial fundamentally unfair is error under state law only when it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citations.]’ (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)” (*People v. Mendoza* (2007) 42 Cal.4th 686, 700.)

Appellant’s attorney repeatedly argued that his client told Officer Lukaszewski that the victims had started the shooting, but the officer did not investigate the self-defense claim. At one point he argued: “He [appellant] told the officer, . . . ‘those guys are shooting at me.’ It’s not like it’s controverted. It’s a fact.” After an objection by the prosecutor, the trial court admonished the jury “you are the last arbiters of what was presented in the trial. The attorneys are arguing what they believe exists in the evidence. You are the last persons responsible for determining what evidence exists.”

Counsel for appellant also argued that if appellant had “gotten to the officers first and the officers listened to what he has to say, maybe he wouldn’t be here and maybe he wouldn’t be a good prosecution witness for Mr. Genyard, Mr. Murray, Jamar, and everyone else sitting over there for shooting at him.”

The instructions given by the trial court correctly informed the jury that it alone was to judge the credibility of the witnesses and that the testimony of only one witness was enough to prove a fact. The jury was also instructed that the argument of counsel was not evidence. Instructions on self-defense and the defense of others, in addition to imperfect self-defense were given. The jury had before it appellant’s testimony about his statement to Officer Lukaszewski. The self-defense theory was vigorously and thoroughly presented by appellant’s counsel. In addition, there was overwhelming evidence of appellant’s guilt. Under these circumstances, we conclude the trial was fair and that reversal is not required.

In his opening brief, appellant claims another instance of prosecutorial misconduct regarding his prior conviction. On direct examination, he admitted he had a prior conviction for felony possession of a firearm. On cross-examination, the prosecutor elicited appellant’s testimony that he had been arrested twice before the present charges. Appellant testified the 2005 conviction was for being a felon in possession of a firearm.

Subsequently, the prosecutor argued that appellant's testimony should be evaluated in light of his two felony convictions for unlawfully carrying a weapon.

According to appellant, his adult criminal history shows only one conviction and one arrest for carrying a concealed weapon which was dismissed as part of a plea negotiation. Respondent cites appellant's probation report, which shows two prior weapons convictions, one for a 2004 offense, and one in 2005. Appellant does not challenge this statement in his reply brief. We have reviewed the probation report and agree that two prior convictions are shown, as appellant testified. The prosecutor did not commit misconduct in arguing appellant had two prior convictions.

### *C. Ineffective Assistance*

Appellant claims his attorney had no tactical reason for keeping out the evidence of the statement to Officer Lukaszewski. As we have discussed, counsel for appellant repeatedly attempted to question the officer about the content of appellant's statement, but was precluded from doing so. We find no ineffective assistance on this ground.

Alternatively, appellant contends that his counsel's failure to object to the prosecutor's comment in closing argument that he had two prior convictions was ineffective assistance under the Sixth Amendment to the United States Constitution. As we have discussed, the record reflects that appellant did have two prior convictions. Counsel for appellant was not ineffective for failing to making an objection which had no merit.<sup>4</sup>

## III

Appellant argues the evidence was insufficient to support a true finding on the criminal street gang enhancement under section 186.22, subdivision (b)(1). That statute provides for an additional term of 10 years for any violent felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the

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<sup>4</sup> Appellant does not claim ineffective assistance of counsel based on his attorney's failure to object to the prosecutor's argument that there was no evidence that appellant told officers he was the victim.

specific intent to promote, further, or assist in any criminal conduct by gang members. . . .”

A criminal street gang is defined in section 186.22, subdivision (f): “As used in this chapter, ‘criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25) inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

Appellant argues there was insufficient evidence of a pattern of criminal gang activity. Section 186.22, subdivision (e) defines “‘pattern of criminal gang activity’” as “the commission of, attempted commission of, conspiracy to commit, or solicitation of, . . . or conviction of two or more of the following offenses, . . .” Subdivision (e)(1) through (33) list the qualifying offenses.

Los Angeles Police Officer Steven Torres testified as the prosecution’s gang expert. Officer Torres said the Barrio Mojados, or BMS, gang was within the jurisdiction of the gang unit to which he is assigned in the Newton Division. Its membership was approximately 140. He had spoken to nine or 10 members of the gang and had what he characterized as a “high degree” of contact with those who claim BMS gang affiliation. He had investigated criminal activity related to or associated with BMS gang activity.

Officer Torres testified that BMS members regularly engage in vandalism, writing on walls, robberies, assaults with deadly weapons, assaults with firearms, attempted murder and murder. He was shown People’s exhibit 5, described by the prosecutor as a three-page certified document reflecting that on July 14, 2006, Gerardo Martinez was convicted of murder (§ 187). Officer Torres said he was familiar with Martinez, and the case number and murder conviction. Based on Martinez’s actions, Officer Torres opined that he is a member of the BMS gang.

People’s exhibit 6 (No. BA3122212, concerning defendant Lawrence Gomez), was shown to Officer Torres. According to the prosecutor, this document reflects that

Gomez was convicted of assault with a firearm in violation of section 245, subdivision (a)(2). Officer Torres opined that Gomez is a member of the BMS street gang “based on the actions committed against victims: pulling out a gun and pointing it at them.” He answered “yes” when the prosecutor asked whether this crime was “in a gang-related manner.” Neither of these exhibits is in the record on appeal.

On cross-examination, Officer Torres explained his conclusion that Gomez and Martinez are BMS gang members, saying he had not investigated those crimes himself. He said, “I spoke with investigating officers on the Lawrence Gomez—I spoke with investigating officers Chacon and Rosa who handled this investigation from the beginning to end. And the case regarding Gerardo Martinez, I spoke with investigating officer Detective Arciniega, who is a detective of homicide, Newton Division, and Officer Nunn, who investigated this homicide from beginning to end.”

We review a true finding of a criminal street gang enhancement for substantial evidence, considering the evidence in the light most favorable to the judgment. (*People v. Leon* (2008) 161 Cal.App.4th 149, 156-157, 161.)

Respondent argues this was sufficient evidence of a pattern of gang activity, citing *People v. Olguin, supra*, 31 Cal.App.4th 1355, 1370. That court held: “[P]olice officers testifying as gang experts presented an adequate foundation for their opinions where they based their testimony on ‘personal observations of and discussions with gang members *as well as information from other officers* and the department’s files.’ [Citation.]” (*Ibid.*, italics added.)

Appellant contrasts this evidence with the evidence presented in *People v. Duran* (2002) 97 Cal.App.4th 1448. In that case, the testifying officer personally knew the gang member who committed one of the predicate offenses, had seen his records and “rap sheet” and had reviewed a minute order of the conviction in that offense. (*Id.* at p. 1464.) This evidence was found sufficient. But the *Duran* court recognized that under *People v. Gardeley* (1996) 14 Cal.4th 605, 620, “a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and *information*

*obtained from colleagues* and other law enforcement agencies.” (*Duran, supra*, at p. 1463, italics added.)

Officer Torres was allowed to rely on the court records and information from other law enforcement officers in testifying as to the two predicate acts introduced here. The evidence was sufficient to support the true finding on the gang enhancement.

#### **DISPOSITION**

The judgment of conviction is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.